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No. 91-1612

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

MARY KATHRYN THOMAS,

Petitioner,

vs.

HOFFMANN-LA ROCHE INC.,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent reformulates the Questions Presented as follows:

Did petitioner properly preserve her "preemption by inference" argument for this Court's review and did this argument form a basis for the decisions of the courts below?

Did the courts below correctly conclude, based on Mississippi law and the facts adduced at trial, that petitioner failed to carry her burden of proof on two elements of her *prima facie* case?

LIST OF PARTIES

Petitioner is Mary Kathryn Thomas.

Respondent is Hoffmann-La Roche Inc. (hereinafter "Roche"). Roche is a corporation organized and existing under the laws of the state of New Jersey, with its principal place of business in Nutley, New Jersey. Roche is affiliated with Roche Holdings, Inc., a Delaware corporation and F. Hoffmann-La Roche Ltd. of Basel, Switzerland. Roche's subsidiaries include Genentech, Inc., a publicly-traded company and the following wholly-owned subsidiaries: Roche Diagnostic Systems, Inc.; HLR Service Corporation; HLR Sciences, Inc.; Lab Delivery Service of New York City, Inc.; Rorad, Inc.; Technad Inc.; Cintichem, Inc.; Roche Professional Service Centers Inc.; HLR Enterprises Inc.; Roche Medical Electronics Inc.; HLR Holdings Inc.; Roche Carolina Inc.; Roche Biomedical Laboratories, Inc.; Roche Pharma, Inc.; Roche Molecular Systems, Inc.; Medical Laboratory Associates, Inc.; Sacramento Clinical Laboratory, Inc.; Columbus Pathology Laboratory, Inc.; Kontron Electronics, Inc.; Medlab of South Georgia, Inc.; KCCL, Inc.; Roche Image Analysis Systems, Inc.; RPSC Inc. and The Hoffman-La Roche Foundation.

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Other Authorities Cited:

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent Hoffmann-La Roche Inc. ("Roche") respectfully submits that certiorari should not be granted in this case. In a unanimous decision, the United States Court of Appeals for the Fifth Circuit affirmed the granting of judgment notwithstanding

the verdict because petitioner failed to sustain her burden of proof on two essential elements of her case under the applicable Mississippi law: (i) that Roche's failure to include certain information in its warnings for the prescription drug Accutane rendered them inadequate; and (ii) that some inadequacy in Roche's warnings was a proximate cause of petitioner's injuries. This decision as well as the district court's decision are consistent with the facts adduced at trial and with precedents of the Fifth Circuit, the Mississippi Supreme Court as well as every other appellate court that has considered fact patterns similar to this case.

In seeking leave for certiorari, petitioner attempts to erect and defeat a "phantom" straw man. Petitioner misreads the *Thomas* decision as holding that the regulations of the United States Food & Drug Administration ("FDA") preempt all failure-to-warn prescription drug cases. After positing this fictional "holding," petitioner then attacks it by relying: (i) on regulations of the FDA not cited in the Fifth Circuit nor district court's decisions; and (ii) on cases not cited by the Fifth Circuit or the district court. A cursory reading of *Thomas* will confirm, however, that it is just not a preemption decision. It is a straightforward affirmance of a district court ruling that petitioner's proof was inadequate to allow a reasonable jury to find in her favor.

Petitioner's preemption argument was not raised below and, therefore, was not preserved for this Court's review. Assuming this argument had been preserved and, in fact, formed the basis for the decisions below, because the courts below correctly applied federal and Mississippi precedents to the facts adduced at trial, there is no reason for this Court to grant certiorari to review correct concurrent findings of the court below.

STATEMENT OF THE CASE

It is undisputed that in early 1984 petitioner took Accutane

under the care and supervision of her prescribing physician, Dr. Robert Myers, as therapy for her unresponsive severe cystic acne. It is similarly clear that petitioner suffered seizures at two widely separated points thereafter — first in 1984, approximately one month after she stopped taking Accutane, and then more than four years later in early 1989.

The trial focused on whether there was any causal link between petitioner's use of Accutane and her seizures (which occur naturally in a significant portion of the population at any given time), whether Roche failed to provide Dr. Myers with adequate warnings about the possible risk of seizures, and whether a more stringent warning would have deterred Dr. Myers from prescribing Accutane. Petitioner's showing on these key points was inadequate.

First, three of petitioner's treating physicians testified that Accutane did not cause any of her seizures, and that an infectious or inflammatory process was responsible for them. This conclusion was based on undisputed evidence found in petitioner's medical records. Petitioner's treating physicians further testified that their conclusions were buttressed by a complete absence of medical literature or scientific studies associating Accutane or its related compounds with seizures.

Second, the evidence established that Accutane and its related compounds were monitored, studied, and analyzed for literally 100 years, without a single person (including petitioner's own experts) having found a causal association or linkage to seizures. Thus, there was no reasonable basis for Roche's warnings to have said anything about seizures at the time petitioner was taking Accutane. To the extent that there were reports of seizures among Accutane patients, they were carefully evaluated and determined not to require a change in warnings.

Third, the uncontradicted proof demonstrated that Dr. Myers

was fully aware of the risks of Accutane, and would have prescribed it to petitioner — even if the warnings read as petitioner claimed they should have.

A. Evidence Concerning the Research and Testing of Accutane

It was established at trial that researchers in Europe began to investigate the usefulness of Accutane in the treatment of certain skin disorders and several types of cancer in the late 1960's. In March 1973, Roche applied to the FDA for permission to begin clinical testing of the drug in this country. After receiving FDA approval, Roche provided the drug to researchers at the National Institute of Health who were conducting studies on its effectiveness in the treatment of several skin disorders.

Between 1973 and 1981, Roche sponsored more than twenty human protocols (or clinical studies) of the drug. Approximately thirty different medical schools throughout the United States participated in these studies. The studies involved approximately 525 patients, who received the drug for periods of time ranging from eight weeks to almost two years. Reports of the results of these studies first appeared in the published medical literature in 1976 and medical textbooks began to discuss the results as early as 1978. None of these studies demonstrated a causal connection between Accutane and seizures.

In addition to these clinical studies, between 1975 and 1980, Roche conducted tests in various animal species for periods of time ranging from thirteen weeks to two years. These studies included short-term and long-term toxicity studies, pharmacokinetics (metabolism) tests, and studies to determine the effect of Accutane on specific organs, including the brain. Again, none of these studies demonstrated a causal connection between Accutane and seizures.

In July 1981, Roche submitted its New Drug Application ("NDA") for Accutane to the FDA. The NDA is the submission a pharmaceutical company makes to the FDA to obtain approval to market a drug; without prior FDA approval, a pharmaceutical company cannot market a drug in this country. As part of the NDA approval process, the FDA specifically reviews, analyzes and approves the language contained in the drug's package insert. The Accutane NDA consisted of more than 400 volumes of material and contained the results of all the animal and clinical studies performed on the drug, as well as information on how the drug would be manufactured. The NDA also contained approximately seventy medical literature articles published on the safety and efficacy of Accutane and its related compounds prior to 1981.

On May 7, 1982, the FDA approved Accutane for prescription by licensed physicians for the treatment of severe recalcitrant cystic acne. The drug was first marketed in September 1982. Approximately 200,000 people took Accutane during the first year it was marketed. Among these individuals, there were six or seven reports of "idiopathic seizures." This information was published in a one-year update article which appeared in the October 1983 issue of the *Journal of the American Academy of Dermatology*, and was read by Dr. Myers shortly thereafter. The information about seizures referred to in this article came from reports sent to Roche by physicians throughout the United States.

By the time petitioner stopped taking Accutane in February 1984, Roche had received only ten reports concerning individuals who experienced seizures during or after the administration of Accutane. Most of these reports were received prior to October 1983 and, therefore, were part of the "rare reports of idiopathic seizures" discussed in the article Dr. Myers studied.

B. The Prescribing Physician's Testimony

Prior to January 1984, Dr. Myers prescribed Accutane to more than five hundred patients, including two of his own children. He had read about the drug in various medical journals and discussed it with colleagues at numerous seminars prior to January 1984. Dr. Myers had followed the development and testing of Accutane since the mid-1970's. In fact, one of Dr. Myers' own patients participated in clinical trials of the drug.

Dr. Myers testified unequivocally that he read, in October or November 1983, an article in one of his journals that stated that Roche had received rare reports of seizures in patients who had taken Accutane. Dr. Myers testified that this article was important to him because it was written by dermatologists whose work he knew and respected. Dr. Myers added that he recalled discussing the article with colleagues at the 1983 annual meeting of the American Academy of Dermatology.

Dr. Myers testified that he individualized the dose of Accutane he prescribed for petitioner to minimize the possibility of side effects. He further testified that if the prescribing information for Accutane in January 1984 had stated that seizures had been reported in patients taking the drug, he still would have prescribed Accutane for petitioner.

Dr. Myers testified that he exercised his independent clinical judgment and decided to prescribe Accutane for petitioner because the benefits of the drug outweighed its possible risks. He testified that the risk/benefit analysis he did with respect to Accutane was no different from the risk/benefit analysis he performed before prescribing other drugs for petitioner.

Dr. Myers testified that all prescription drugs have some side effects and that a physician does not tell his patients everything

he knows about a drug. Dr. Myers explained that, as "captain of the ship," it was his responsibility to decide whether a patient should receive a particular drug and what a patient should know about a drug.

Dr. Myers testified that he did not expect a pharmaceutical company to tell him how to practice medicine. He further testified that before he prescribed a drug, he looked to several sources of information — medical literature, colleagues and his own prior medical experience — and not just to the Physicians' Desk Reference. Dr. Myers testified that he did not focus on any one sentence of the package insert, but rather looked at the entire document.

C. Petitioner's Warning and Proximate Cause Evidence

The only witness who testified for petitioner on the issues of the adequacy of Roche's warnings and proximate cause was James O'Donnell. Mr. O'Donnell, a pharmacist and nutritionist, is not a doctor, and thus candidly admitted that he was not competent or qualified to give an opinion regarding the risk/benefit analysis a physician must perform before prescribing a drug.[1] He also admitted that he was not qualified to "second guess" Dr. Myers' diagnosis that petitioner had severe recalcitrant cystic acne. He further admitted that he was not qualified to comment on Dr. Myers' testimony that he knew about reports of seizures prior to prescribing Accutane to petitioner in January 1984.

Mr. O'Donnell testified that the first anecdotal report in the medical literature associating hypervitaminosis A with a seizure

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1. Petitioner asserts that Mr. O'Donnell testified at trial Accutane "caused Ms. Thomas' seizures." Petitioner's Brief at 6. This statement is not accurate because the district court determined that Mr. O'Donnell was not qualified to render an opinion on this issue. *Thomas v. Hoffmann-La Roche Inc.*, 731 F. Supp. 224, 226 n.2 (N.D. Miss. 1989).

did not appear until November 1983, approximately two months before petitioner was prescribed Accutane. At the time petitioner was prescribed the drug, Mr. O'Donnell did not associate Accutane with seizures, nor did he associate vitamin A with seizures. Mr. O'Donnell testified that a pharmaceutical company cannot tell a physician how to practice medicine and that a package insert is not supposed to be a medical textbook, but only a summary of information.

D. The Decisions Below

The district court, after receiving full submissions from both parties and having "thoroughly examined" the record, granted judgment notwithstanding the verdict. The district court held that petitioner's: (i) causation proof amounted to mere "speculation" because none of her experts had been able to find any link between Accutane and seizures; and (ii) proximate cause evidence was insufficient applying a decision of the Mississippi Supreme Court, *Wyeth Laboratories v. Fortenberry*, 530 So. 2d 688 (Miss. 1988). *Thomas v. Hoffmann-La Roche Inc.*, 731 F. Supp. 224 (N.D. Miss. 1989).

The district court's decision was then reviewed and unanimously affirmed by the Fifth Circuit. *Thomas v. Hoffmann-La Roche Inc.*, 949 F.2d 806 (5th Cir. 1992). Relying on *Fortenberry*, the Fifth Circuit upheld the district court's determination that petitioner's "proximate cause evidence" was insufficient. The Fifth Circuit further held that petitioner's "warnings evidence" also was insufficient based on *Fortenberry*.

REASONS FOR DENYING THE WRIT

I.

THE ISSUE UPON WHICH PETITIONER SEEKS CERTIORARI WAS NOT PROPERLY PRESERVED FOR REVIEW

This Court has consistently held that certiorari will not be granted with respect to issues not raised below. *See Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958); *Husty v. United States*, 282 U.S. 694, 701-02 (1931). Petitioner's "preemption by inference" argument was not raised in the district court nor was it raised in petitioner's appeal to the Fifth Circuit.[2] For this reason alone, certiorari should not be granted. *See Belcher v. Stengel*, 429 U.S. 118, 119-20 (1976); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

II.

THE ISSUE UPON WHICH PETITIONER SEEKS CERTIORARI WAS NOT ADDRESSED BY THE COURT BELOW

Petitioner's assertion that the *Thomas* decision holds that state tort law claims are subject to "preemption by negative inference" is, at best, disingenuous. The word preemption cannot be found in the Fifth Circuit's opinion. Nor can it be found in the district court's decision. Neither the Fifth Circuit nor the

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2. In her petition for rehearing, petitioner did mention preemption. By waiting until this late moment to first present the question raised by her writ, petitioner waived her right to have this Court review the question. *See Prudential Fed. Savings & Loan Ass'n v. Flanigan*, 478 U.S. 1311, 1311 (1986) (question raised for the first time in petition for rehearing not preserved for review).

district court cited *Hurley v. Lederle Laboratories*, 863 F.2d 1173 (5th Cir. 1988) — a case discussed at some length in petitioner's brief — to support their respective holdings. In fact, none of the cases discussed in petitioner's brief were cited by the courts below. Similarly, neither the Fifth Circuit nor the district court cited or relied upon any regulations of the FDA cited and quoted by petitioner to reach their respective conclusions.[3]

In *Thomas*, the Fifth Circuit held that petitioner's "warning" and "proximate cause" evidence was insufficient to create a jury issue. With regard to the warning evidence, the facts that supported this conclusion, included: (i) Dr. Myers' testimony on the subject; (ii) the available medical literature and reports that indicated that there was no relationship between Accutane and seizures; (iii) the testimony of petitioner's expert, Mr. O'Donnell; and (iv) determinations made by the FDA regarding the warnings for Accutane. *Thomas*, 949 F.2d at 814-18.

In the courts below, petitioner conceded that review and approval of warnings by the FDA can be considered as evidence that they are adequate. In fact, several cases cited in petitioner's brief stand for this proposition. *See, e.g., Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1540 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984); *Graham v. Wyeth Laboratories*, 666 F. Supp.

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3. Petitioner's assertions regarding the preemption questions addressed by *Thomas* are not supported by subsequent Fifth Circuit decisions. In *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 917 n.2 (5th Cir. 1992) (King concurring), the Fifth Circuit construed *Thomas* as a "failure-to-warn" case in which petitioner did not produce sufficient objective evidence to support her claims. In *Perry v. Mercedes Benz of North America, Inc.*, 1992 U.S. App. Lexis 6507 (5th Cir. Apr. 10, 1992), without mentioning *Thomas*, the Fifth Circuit declined to find "total preemption" in a strict liability case involving an automobile. If *Thomas* stands for the proposition espoused by petitioner, it clearly would have been distinguished or cited by the Fifth Circuit in *Perry*.

1483, 1491 (D. Kan. 1987). The Fifth Circuit considered the FDA's review and approval of respondent's warnings to be evidence — along with other facts — that they were not inadequate. The manner in which the Fifth Circuit used this type of evidence is consistent with decisions of other appellate courts. *See, e.g., Johnson v. American Cyanamid Co.*, 239 Kan. 279, 718 F.2d 1318 (1986), *aff'd on other grds*, 243 Kan. 291, 758 P.2d 206 (1988); *Rhoto v. Ribando*, 504 So. 2d 1119 (La. Ct. App.), *cert. denied*, 506 So. 2d 1225 (1987); *White v. Wyeth Laboratories*, 40 Ohio St. 3d 390, 533 N.E. 2d 748 (1988); *McDaniel v. McNeil Laboratories*, 198 Neb. 190, 241 N.W. 2d 822 (1976).

Nowhere in the *Thomas* decision can it be inferred that the Fifth Circuit determined that the fact that the FDA reviewed and approved the warnings, in and of itself, preempted petitioner's case. If that was how the case was decided, then it would have been unnecessary for the Fifth Circuit to have discussed: (i) the available medical literature and reports addressing the possible relationship between Accutane and seizures; (ii) the significance of Dr. Myers' testimony; and (iii) the deficiencies in petitioner's proof; as well as (iv) the applicability of Comment j to the *Restatement (Second) of Torts.* Because the Fifth Circuit's decision does, in fact, analyze all these evidentiary issues in some detail, *see Thomas, supra*, 949 F.2d at 814-18, this Court should conclude that the fictional holding which petitioner asks it review was not addressed below. Therefore, this Court should decline to grant certiorari. *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988); *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981).

III.

REVIEW SHOULD BE DENIED BECAUSE THE CONCURRENT FINDINGS OF FACT MADE BY THE TWO COURTS BELOW WERE CORRECT

In ruling that petitioner's proximate cause evidence was lacking, both the Fifth Circuit and the district court relied heavily upon *Fortenberry*, a decision of the Mississippi Supreme Court. *Fortenberry* holds that a Mississippi plaintiff, in a failure-to-warn case involving a prescription drug, must prove that an adequate warning would have prevented her injuries by demonstrating both: (i) that an adequate warning would have prevented the treating physician from administering the drug; and (ii) that the injury would not have occurred had the drug not been administered. *Thomas, supra*, 949 F.2d at 814. This rule, the Fifth Circuit and district court recognized, is one adhered to by other appellate courts. *See, e.g., Plummer v. Lederle Laboratories*, 819 F.2d 349 (2d Cir.), *cert. denied*, 484 U.S. 898 (1987); *Kirsch v. Picker Int'l*, 753 F.2d 670 (8th Cir. 1985); *Stanback v. Parke, Davis & Co.*, 657 F.2d 642 (4th Cir. 1981).

Both the Fifth Circuit and the district court found that petitioner failed to prove that a "hypothetically adequate warning" would have changed the actions taken by Dr. Myers, the prescribing physician. Because this is exactly how Dr. Myers' testified at trial, the Fifth Circuit and the district court correctly concluded that a reasonable jury could not have found that petitioner established this essential element of her claim. These concurrent findings were not erroneous. Accordingly, certiorari should not be granted. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662 (1987); *Berenyi v. District Director, Immigration & Naturalization Serv.*, 385 U.S. 630, 635-36 (1967).

CONCLUSION

For all the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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